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Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

SMITA SANGHVI; TARUN SANGHVI,
Petitioners,

v.

CITY OF CLAREMONT,
Respondent

On Petition for Writ of Certiorari To The United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER IMMUNITY FROM LIABILITY AFFORDED BY THIS COURT UNDER THE NOERR-PENNINGTON DOCTRINE IN THE SHERMAN ANTI-TRUST CONTEXT CAN BE EXTENDED TO AN ACTION BROUGHT AGAINST A MUNICIPALITY FOR CIVIL RIGHTS VIOLATIONS UNDER 42 U.S.C. § 1983?

2. WHETHER IT WAS REVERSIBLE ERROR FOR THE DISTRICT COURT TO INSTRUCT THE JURY ON THE BURDEN OF PRODUCTION FRAMEWORK ENUNCIATED BY THIS COURT IN *MCDONNELL DOUGLAS CORP. v. GREEN*, 411 U.S. 545 (1990) AND *TEXAS DEP'T OF COMMUNITY AFFAIRS v. BURDINE*, 450 U.S. 248?

LIST OF PARTIES TO THE PROCEEDINGS

The parties to the proceeding are Petitioners Smita Sanghvi and Tarun Sanghvi and Respondent City of Claremont.

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OPINIONS BELOW

The Order by the United States District Court Granting and Denying Defendant's Motion for Summary Judgment or in the Alternative Summary Adjudication was entered on March 26, 2001 and is unreported (the "District Court Order re: Summary Judgment") (App. E). The Order by the United States District Court Denying Plaintiffs' Motion for Judgment as a Matter of Law or for a New Trial was entered on June 26, 2001 and is unreported (the "District Court Order re: Motion for New Trial") (App. D). The Judgment After Trial Jury by the United States District Court was entered on June 6, 2001 and is unreported (the "District Court Judgment") (App. C) . The Opinion of the United States Court of Appeals for the Ninth Circuit affirming the District Court Judgment, Order re: Motion for New Trial and Order re: Summary Judgment was entered on May 5, 2003 and was reported at 328 F.3d 532 (the "Ninth Circuit Opinion") (App. B) . The Order of the United States Court of Appeals for the Ninth Circuit denying Plaintiffs' Petition for Rehearing and Petition for Rehearing En Banc was entered on July 14, 2003 and was unreported (the "Ninth Circuit Order") (App. A).

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on May 5, 2003. The Order of the United States Court of Appeals for the Ninth Circuit denying the Petition and the Petition for Rehearing En Banc was entered on July 14, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent provisions of 42 U.S.C. § 1983 and the First and Fourteenth Amendments of the United States Constitution is set forth below:

Section 1 of the Ku Klux Klan Act of 1871, Rev. Stat. 1979, as amended, 42 U.S.C. § 1983 provides:

> "Any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any state, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proceeding for redress."

The First Amendment to the United States Constitution states:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fourteenth Amendment to the United States Constitution, Section 1 states in pertinent part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person

of life, liberty or property, without due process of law; nor deny to ant person within its jurisdiction the equal protection of the laws."

The Fair Housing Act, 42 U.S.C. § 3604 (f) (2) (B) states in pertinent part that it is unlawful:

"[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of . . . a person residing in or intending to reside in the dwelling after it is sold, rented, or made available . . ."

Federal Rule of Civil Procedure 51 states in pertinent part:

"No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

STATEMENT OF THE CASE

A. FACTS

Petitioners Smita Sanghvi and Tarun Sanghvi ("Petitioners") petition for review the entry of judgment by the United States Court of Appeals for the Ninth Circuit in favor of the Respondent City of Claremont (the "Respondent", or "City").

The petitioners, operators and developers of various Alzheimer's care facilities in the County of Los Angeles,

allege that their civil rights under the Civil Rights Act, 42 U.S.C. § 1983, and the Fair Housing Act ("FHA"), 42 U.S.C. § 3604(f) (2) (B), were violated by a seven year campaign by the respondent to delay and obstruct their development of an Alzheimer's facility in an unincorporated area of the County of Los Angeles adjacent to the City's borders.

Explaining that it had an existing policy against connecting properties outside its corporate limits to the City sewer system unless the property owners agreed to annexation, the respondent refused to provide the requested service to the petitioners despite providing such services to many other property owners in the same unincorporated area without requiring annexation.

Additionally, the petitioners contend that the respondent engaged in a campaign and policy of unlawful retaliation against them by improperly causing the temporary closure of the facility once it opened in September of 1997 by respondent's employees working undercover and reporting alleged violations of state laws regarding safety to facility patients. Petitioners contend that the respondent's actions were pretextual and the real reason was to retaliate against them for exercising their constitutional rights in refusing to annex their property within the corporate limits and conform their property to the City's general development plan; refusing to withdraw their efforts to expand the facility before County administrative bodies; defending a meritless legal action filed by the respondent to prevent opening of the facility once the petitioners obtained approval to open in September of 1997 from the State and County of Los Angeles; and by instituting this action shortly thereafter to protect their civil rights.

The respondent's actions spanned a seven year period from 1991 until 1998, delaying the opening of the facility until September of 1997 when the County of Los Angeles eventually permitted the facility to open without requiring connection to the City sewer system, and also included the facility's temporary closure in 1998 and eventual reopening that same year with approval for further expansion by the County of Los Angeles.

After the respondent filed suit in the Superior Court for the County of Los Angeles in September of 1997 in an effort to block the opening of the expanded facility, the petitioners filed suit shortly thereafter in the United States District Court for the Central District of California contending that the respondent's actions violated their civil rights and discriminated against the handicapped Alzheimer's patients who would reside in the facility under 42 U.S.C. § 1983, and 42 U.S.C. S 3604(f) (2) (B).

The petitioners' federal civil rights lawsuit was initially dismissed with prejudice pursuant to respondent's motion to dismiss under Federal Rule of Civil Procedure 12(b) (6) and was reinstated in part by the United States Court of Appeals for the Ninth Circuit in an unpublished memorandum decision in February of 2000.[1]

Upon return to the district court, a second lawsuit that was filed during the pendency of the appeal and that alleged additional subsequent violations of petitioners' civil rights by the respondent under 42 U.S.C. § 1983 and 42 U.S.C. § 3604(f) (2) (B) after the dismissal of the initial lawsuit, was

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[1] The Court of Appeals Table Decision is cited at 211 F.3d 1274 (9th Cir. 2000) and can be found at 2000 WL 222605.

consolidated with the remanded action. After completion of discovery, summary judgment proceedings filed by the respondent disposed of all of the petitioners' FHA claims of discrimination based on disparate treatment, and the respondent's failure to reasonably accommodate the housing needs of the disabled Alzheimer's patients.

In ruling on respondent's motion for summary judgment, the district court found that " [t]here appears to be no dispute that Plaintiffs have established a prima facie case [of disparate treatment]," by producing evidence of multiple sewer system connections by other property owners in the same unincorporated area without requiring annexation. (App. E, at 38a).

The district court further found that what was at issue was whether the respondent had presented a legitimate non-discriminatory reason for its actions which petitioners had failed to rebut. (App. E at 38a-39a) . The district court proceeded to analyze this issue by observing that the respondent explained that it provided services to other County properties mistakenly because a City employee was not aware of the sewer annexation policy and that the respondent further proffered a legitimate non-discriminatory reason why the connections remain is that these individuals relied on the respondent's mistake to obtain a sewer connection, and that the respondent could not simply unhook their properties, thus, the respondent explained, it took the proper action by requiring these owners to pay their share of the upkeep of the sewer rather than disconnect their properties. (App. E, at 39a).

By contrast, the district court found that the petitioners presented "**persuasive evidence** that Defendant's proffered non-discriminatory reason is pretextual. In 1997, the Mayor

of Claremont conditioned access to the sewer system on Plaintiff's annexation to the City. At the same time, other properties outside the City were receiving service, and still continued to receive service. It also appears that the City began to require properties to annex in order to receive service only when Plaintiffs requested service for their facility. Finally, on or about the same day, Plaintiff's application for a use permit was heard by the County, and objected to by Defendant, a property outside the City limits received a permit to hook up to the City's sewer service." (App. E, at 39a) (emphasis added).

On this basis the district court found that petitioners presented sufficient evidence to show that the proffered reason was pretextual, and denied summary adjudication on this claim. (App. E, at 39a).

The district court further found that petitioners' claim against respondent under 42 U.S.C. § 1983 for retaliation for petitioners' exercise of their constitutional rights was barred by Ninth Circuit case law first enunciated in *Manistee Town Center v. City of Glendale*, 227 F.3d 1090, 1093 (9th Cir. 2000). The Ninth Circuit has extended the Noerr-Pennington doctrine of immunity from suit for petitioning activity by individuals that originated in the antitrust context to suits under 42 U.S.C. § 1983 against governmental entities and their officials for alleged unconstitutional activity. (App. E, at 35a-37a) .

After summary judgment proceedings, petitioners' remaining FHA claims of discrimination based on disparate treatment and the respondent's failure to reasonably accommodate the housing needs of the disabled Alzheimer's patients were tried to a jury which returned a verdict in favor of the respondent. (App. D., at 29a-30a).

During the course of the trial the petitioners made a motion for judgment as a matter of law under Federal Rule of Civil Procedure 50 (a) contending, among other things, that they had established a prima facie case of discrimination under the framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981), by producing sufficient evidence to make the showing to survive summary judgment and producing such evidence at trial, and further requested that the jury be instructed that they had established their prima facie case. (App. B, at 8a-10a).

The district court denied the petitioners' motion for judgment as a matter of law, and instructed the jury in the *McDonnell Douglas* burden-shifting framework in its general jury instructions and special verdict form. (App. B, at 11a-14a).[2]

In its deliberations, the jury requested clarification of the term "qualified" as used in the special verdict form which the district court responded meant "whether Plaintiffs were similarly situated as other persons outside the City who received sewer hook-ups. The City of Claremont was the sole agency which could qualify Plaintiffs for a sewer connection." (App. B, at 19a-20a).

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[2] The general jury instructions and special verdict form are set forth in haec verba in the Ninth Circuit published opinion. (App. B, at 11a-14a). Petitioners offered an alternative general instruction that advised the jury that they had established their prima facie case of disparate treatment and that focused on the ultimate question of discrimination regarding whether respondent's proffered legitimate non-discriminatory reason was pretextual. (App. B, at 18a).

Significantly, the jury in reaching a verdict for the respondent never reached the ultimate question of discrimination as to whether the respondent's proffered legitimate non-discriminatory reason was pretextual, finding rather that the petitioners had not established a prima facie case that they were qualified to receive a sewer hookup. (App. B, at 20a).

After trial, petitioners renewed their motion for judgment as a matter of law under Federal Rule of Civil Procedure 50(b), or in the alternative, for a new trial, which was denied by the district court. (App. C, 24a-28a).[3]

In reaching its decision, the district court concluded that the jury found that petitioners had failed to establish a prima facie case, answering no to the question of whether petitioners applied for a sewer connection for which they were qualified. (App. C, at 26a).

The district court rejected the petitioners' argument that this Court's holding in *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983), which held that "when the defendant

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[3] The district court indicated that petitioners did not identify any reason why they were entitled to renew their motion for judgment as a matter of law. (App. C, at 26a). Federal Rule of Civil Procedure 50(a) requires that the motion be brought at the close of evidence before the jury retires to deliberate and after the verdict is returned under subsection (b). The Ninth Circuit has adopted a very stringent rule in this regard that if a party fails to bring a motion both before and after the jury verdict, the motion is waived. See *Patel v. Penman*, 103 F.3d 868, 873-874 (9th Cir. 1996). The district court did go on to discuss the motion on the merits. (App. C, at 26a).

fails to persuade the district court to dismiss the action for lack of a prima facie case, and responds to the plaintiff's proof by offering evidence of the reason for the [challenged action], the question whether the plaintiff "really [established] a prima facie case is no longer relevant," and "the factfinder must then decide whether the rejection was discriminatory," *Id.*, 460 U.S. at 714-715, was to the contrary.

In doing so, the district court relied upon prior Ninth Circuit precedent that limited *Aikens* holding by requiring district courts to provide specific findings of a prima facie case only in Title VII cases. (App. C, at 26a-27a).

The Ninth Circuit in a published opinion affirmed the district court judgment, the orders denying the petitioners' motions for judgment as a matter of law, or in the alternative, for a new trial, and the order granting partial summary adjudication on the retaliation claim under 42 U.S.C. § 1983.

In reaching its conclusion, the Ninth Circuit held that the petitioners were (1) not entitled to judgment as a matter of law that they had established their prima facie case of discrimination (App. B, at 6a-10a); (2) that although the district court erred in instructing the jury in the *McDonnell Douglas* burden-shifting framework in its general jury instructions and special verdict form, the assignment of error to the instructions on this ground was waived by failing to object to it before the jury retired under Federal Rule of Civil Procedure 51, and the objection that the special verdict form was confusing, even if in error, was harmless (App. B, at 11a-21a) ; and (3) that the 42 U.S.C. § 1983 retaliation claim was barred under the Noerr-Pennington doctrine. (App. B, at 21a-22a).

Petitioners then filed a petition for rehearing and petition for rehearing en banc which was denied, arguing, among other things, that there was not a waiver to the objection to the use of the *McDonnell Douglas* burden-shifting framework in its general jury instructions and special verdict form under Federal Rule of Civil Procedure 51, and that the Ninth Circuit's extension of the Noerr-Pennington immunity to an action brought against a municipality under 42 U.S.C. § 1983 was directly contrary to the text and history of § 1983 and this Court's precedents interpreting the same and the constitutional structure underlying the Fourteenth Amendment of the United States Constitution. (App. A. at la-2a).

REASONS FOR GRANTING THE WRIT

A. THE NINTH CIRCUIT HAS FUNDAMENTALLY ERRED IN HOLDING THAT NOERR-PENNINGTON IMMUNITY - AN IMMUNITY THAT THIS COURT FIRST FORMULATED TO CASES INVOLVING INDIVIDUAL PETITIONING ACTIVITY IN THE ANTITRUST CONTEXT - CAN BE EXTENDED TO A SUIT BROUGHT AGAINST A MUNICIPALITY UNDER 42 U.S.C. § 1983.

The Ninth Circuit has adopted the remarkable rule that the *Noerr-Pennington* doctrine[4] of immunity from liability can be extended to suits brought under 42 U.S.C. § 1983 against

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[4] Named after *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965).

municipalities for alleged unconstitutional activity. (App. B, 21a-22a; App. E, at 35a-37a).

The Ninth Circuit's holding is fundamentally and directly contrary to this Court's understanding that Congress in enacting § 1983 intended to impose strict liability on a municipality's unconstitutional actions; directly contrary to the policy purposes effectuated by § 1983 and the constitutional structure animating the relationship between the first eight Amendments to the Constitution and the Fourteenth Amendment. Moreover, this Court has never suggested that the *Noerr-Pennington* doctrine can be applied to alleged unconstitutional governmental activity in the context of a § 1983 suit let alone to a claim by a private citizen against the government for unconstitutional retaliation.

This Court has emphasized that by its terms, § 1983 "creates a species of tort liability that on its face admits of no immunities." *Imbler v. Pachtman*, 424 U.S. 409, 417, 96 S.Ct. 984, 988, 47 L.Ed.2d 128 (1976). The Court has further stated that " [i]ts language is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted. Rather, the Act imposes liability upon 'every person' who, under color of state law or custom, 'subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws." *Owen v. City of Independence*, 445 U.S. 622, 635, 100 S.Ct. 1398, 1407, 63 L.Ed.2d 673 (1980).

However, notwithstanding § 1983's expansive language and the absence of any express incorporation of common-law immunities, the Court has, on several occasions found that a tradition of immunity was so firmly rooted in history and was supported by such strong policy reasons that "Congress would

have specifically so provided had it wished to abolish the doctrine." *Pierson v. Ray*, 386 U.S. 547, 555, 87 S.Ct. 1213, 1218, 18 L.Ed.2d 288 (1967). In each of the cases where the Court has found immunities of varying scope appropriate for different local and state officials sued under § 1983, its finding "was predicated upon a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it." *Imbler v. Pachtman, supra*, 424 U.S. at 421, 96 S.Ct. 990.

In *Owen*, the Court took up the question reserved in *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 701, 98 S.Ct. 2018, 2041, 56 L.Ed.2d 611 (1978)-whether local governments, although not entitled to an absolute immunity should be afforded some form of official immunity in § 1983 suits. *Owen, supra*, 445 U.S. at 623, 100 S.Ct. at 1402. The Court held that there is no tradition of immunity for municipal corporations, municipalities, unlike its employees and officers, are strictly liable for unconstitutional torts caused pursuant to official policy, custom, or practice. *Owen, supra*, 445 U.S. at 639, 100 S.Ct. at 1409.

Significantly, the Court rejected any distinction between a municipality's "governmental" and "proprietary" functions as a basis for affording it some form of qualified immunity. In doing so, the Court noted that a municipality's common-law immunity for "governmental" functions derives from the principle of sovereign immunity, an immunity that was abrogated by Congress when it enacted § 1983 and included "municipalities within the class of "persons" subject to liability for violations of the Federal Constitution and laws, Congress - the supreme sovereign on matters of federal law - abrogated whatever vestige of the State's sovereign immunity

the municipality possessed." *Owen, supra*, 445 U.S. at 648, 100 S.Ct. at 1413-14.[5]

Owen also rejected any common-law immunity for "discretionary" functions - a distinction between municipal functions that is grounded not on the principle of sovereign immunity, but on a concern of separation of powers. As the Court explained:

> "The common-law doctrine merely prevented courts from substituting their own judgment on matters within the lawful discretion of the municipality. But a municipality has no 'discretion' to violate the Federal Constitution. And when a court passes judgment on the municipality's conduct in a § 1983 action, it does not seek to second-guess the 'reasonableness' of the city's decision nor to interfere with the local

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[5] To be sure, Congress' enforcement power under § 5 of the Fourteenth Amendment, is a "positive grant of legislative power" and " [l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" *City of Boerne v. Flores*, 521 U.S. 507, 519, 117 S .Ct. 2157, 2163, 138. L. Ed. 2d 624 (1997) (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455, 96 S.Ct. 2666, 2671, 49 L.Ed.2d 614 (1976).

Congress' power under § 5 is of course not without limits. The Court has described this power as "remedial" and the Court has further noted that the design of the Fourteenth Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restriction on the States. *City of Boerne, supra*, 521 U.S. at 519, 117 S.Ct. at 2164.

> government's resolution of competing policy considerations. Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and statutes." *Owen, supra*, 445 U.S. at 651, 100 S.Ct. at 1415.

Owen makes clear that Congress in creating an express and unique federal remedy under § 1983 to protect the people from unconstitutional state action has imposed a form of strict liability for a municipality's unconstitutional action. *Owen, supra*, 445 U.S. at 651, 100 S.Ct. at 1415.

Nor is there a "tradition so well grounded in history and reason" that would warrant the conclusion that in enacting § 1 of the Civil Rights Act, the 42nd Congress recognized or extended to municipalities any claimed common-law or constitutional immunity based on petitioning activity and the First Amendment.

This Court has long recognized as obvious that "[t]he first eight Amendments to the Constitution set forth self-executing prohibitions on **governmental action**. . . ". Cf. *City of Boerne, supra*, 521 U.S. at 523, 117 S.Ct. at 2166 (emphasis added).

The Ninth Circuit committed a fundamental category mistake in finding that government is afforded a constitutional immunity to engage in petitioning activity under the First Amendment when confronted with an alleged violation of the Fourteenth Amendment by a private citizen. The *Noerr-Pennington* doctrine is simply inapplicable and irrelevant to government misconduct in the context of an alleged violation of the Fourteenth Amendment. Cf. *Mitchum v. Foster*, 407 U.S. 225, 92 S. Ct. 2151, 32 L. Ed. 2d 705 (1972) (Congress in enacting the Fourteenth Amendment intended to interpose

the federal courts between the States and the people - to protect the people from unconstitutional state action).

In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, 611, 30 L.Ed.2d 642 (1972), this Court recognized that the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances. Accordingly, the Court construed the antitrust laws as not prohibiting the filing of a lawsuit, regardless of the plaintiff's anticompetitive intent or purpose in doing so, unless the suit was a "mere sham" filed for harassment purposes. *Id.*, 404 U.S. at 511, 92 S.Ct. at 612.

The Ninth Circuit, by immunizing motive and intent whenever there is petitioning activity on the part of government, effectively renders the Fourteenth Amendment powerless, turning it into mere surplusage anytime improper petitioning activity by a municipality is asserted. By this reasoning, the right to petition would immunize a municipality of liability under the Equal Protection Clause-a Fourteenth Amendment claim - notwithstanding evidence that a particular municipality had pursued delay litigation tactics because of an individual's race or religious belief, just so long as it could articulate some non-frivolous justification to support its lawsuit. Such a result is clearly contrary to this Court's constitutional jurisprudence and clearly contrary to this Court's case law as to the legal predicates necessary to be demonstrated with respect to petitioners' § 1983 retaliation claim. Under this Court ' s jurisprudence, motive and intent is essential to petitioners' claim.

In *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 97 S.Ct. 568, 50 L. Ed. 2d 471 (1977), this Court held that a plaintiff alleging retaliation for the exercise

of constitutionally protected rights must first show that the protected conduct was a "substantial" or "motivating" factor in the defendant's decision. After a plaintiff makes the required showing, the *Mt. Healthy* test requires a defendant to show, by a preponderance of the evidence, that it would have reached the same decision in the absence of the protected conduct.

Motive and intent is a necessary and essential legal predicate to petitioners' retaliation claim[6] - the test formulated in *Mt. Healthy* with respect to constitutional claims of this sort is simply irreconcilable with the objective standard formulated by this Court in *California Motor Transport Co.* to private petitioning activity.

Additionally, the contours of *Noerr-Pennington* immunity, as formulated by this Court, has only been applied to private parties - not governmental entities - seeking redress from government. *Professional Real Estate Investors, Inc. v. Columbia Pictures Ind., Inc.*, 508 U.S. 49, 113 S.Ct. 1920, 123 L.Ed. 2d 611 (1993) (protecting private movie companies from antitrust liability); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 103 S.Ct. 2161, 76 L.Ed.2d 277 (1983) (extending First Amendment protections to private employer who filed lawsuit against former employee allegedly in violation of the National Labor Relations Act); *California Motor Transport Co. v. Trucking Unlimited, supra*, (refusing to apply First Amendment protections to private trucking company because it fell within "sham" exception).

The Court has never suggested that *Noerr-Pennington* immunity can be extended to governmental activity.

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[6] See App. E, 35a.

In conclusion, the legislative purpose in enacting § 1983, considerations of public policy and the constitutional structure underlying the relationship between the First and Fourteenth Amendments, and this Court's jurisprudence strongly compel the conclusion that the Ninth Circuit has fundamentally erred in extending the *Noerr-Pennington* doctrine to § 1983 *Monell* claims.

Because of the national importance of the issue, the Court should grant certiorari.

B. THIS COURT SHOULD CLARIFY THE CIRCUIT SPLIT AS TO THE USE OF THE MCDONELL-DOUGLAS FORMULATION IN INSTRUCTING THE JURY.

The Ninth Circuit Opinion exhaustively collects and cites the split among the circuits as to the use of the *McDonell-Douglas* formulation in instructing the jury. (App. B, at 15a-171). As the Ninth Circuit Opinion notes, some circuits criticize any use of the *McDonell-Douglas* formulation in instructing the jury, emphasizing that the only question that should go to the jury is the ultimate question of discrimination; other circuits do not reject the *McDonell-Douglas* formulation outright but instead condemn the use of legalistic language and the complexities of burden shifting; while some circuits have not rejected use of the framework in instructing the jury.

Petitioners agree with the conclusion reached by the Ninth Circuit that it was error in this case to charge the jury with the elements of the *McDonell-Douglas* formulation since it has a significant potential to confuse juries and "'at [the jury] stage, the framework unnecessarily evades the ultimate question of

discrimination vel non.'" (App. B, at 17a-18a) (quoting *Aikens, supra*, 460 U.S. 711, 716, 103 S.Ct. 1478.

However, petitioners seriously dispute that they waived their challenge to the instructions the district court gave the jury by failing to object to it under *Federal Rule of Civil Procedure* 51. (App. B, at 18a).

This Court considered a similar issue of waiver under Rule 51 in *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981). In *City of Newport*, the Court considered the question of the propriety of a jury instruction given at trial in a suit brought under §1983 against a municipality which was not objected to at trial and specifically found by the district court to have been procedurally defaulted under Rule 51. On appeal, the United States Court of Appeal for the First Circuit affirmed, finding that the petitioner had failed to object to the charge at trial, and further finding that there was no plain error that seriously affected the fairness, integrity or public reputation of the trial that would allow an exception to the waiver under Rule 51. The First Circuit also expressed a belief that such an instruction might well not have been error at all although this was not necessary to its holding. *Id.*, 453 U.S. at 255, 101 S.Ct. at 2753.

Yet this Court found that since the district court did not rely on the procedural default but reached and fully adjudicated the merits, and the Court of Appeals did not disagree with that adjudication, "no interests in fair and effective trial administration advanced by Rule 51 would be served if we now refused to reach the merits ourselves." *Id.*, 453 U.S. at 255-256, 101 S.Ct. at 2754.

Significantly, the district court in ruling on the motion for judgment as a matter of law, or in the alternative for a new trial, explicitly recognized that petitioners had made a similar motion at trial and did not find that there had been a procedural default under Rule 51. Rather, the district court proceeded to consider the petitioners' substantive legal arguments on the merits. (App. C, 24a-28a)

Not only did the district court proceed to consider the petitioners' substantive legal arguments on the merits and never found, as the district court in *City of Newport* a procedural default under Rule 51, the Court of Appeals despite finding waiver under the rule extensively discussed the issue and found that it was error for the district court to instruct the jury on the *McDonell-Douglas* framework, (App. B, 11a-18a).

This case is not materially distinguishable from *City of Newport* except that unlike *City of Newport*, the district court here never found a waiver under Rule 51. Thus, the Court should review and resolve the confusion and split among the circuits on the issue of whether it is reversible error to instruct the jury on the *McDonell-Douglas* framework.

Furthermore, as in *City of Newport*, the Court's review should not be limited to determining whether "plain error" has been committed[7], an exception that is invoked on occasion by the Courts of Appeals absent timely objection in the trial court. As this Court held in *City of Newport*, "plain error" review is not suited to a case when the law is in a state of

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[7] The Ninth Circuit stands alone among the circuits as the strictest enforcer of Rule 51 declaring that there is no "plain error" exception in civil cases. Cf. *Hammer v. Gross*, 932 F.2d 842, 847 (9th Cir. 1991) (en banc).

"evolving definition and uncertainty." *City of Newport*, 453 U.S. at 255, 101 S.Ct. at 2754. The *very* novelty of the legal issue at stake and the nature of the circuit split calls for unrestricted review.[8] [9]

Turning to the legal issue at hand, *McDonell-Douglas* and subsequent decisions has "established an allocation of the burden of production and an order for the presentation of proof in . . . discriminatory treatment cases." *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993). This Court has stated "that the burden is one of production, not persuasion; it can involve no credibility assessment." *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142, 120 S.Ct. 2097, 2106, 147 L.Ed.2d 105 (2000) (internal quotation marks and citations omitted).

Petitioners at all stages of these proceedings met their burden of production as to establishing a prima facie case of discrimination. At the summary judgment level, the district court held that there was no dispute that the petitioners had established a prima facie case of discrimination; rather, the

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[8] More so, until this case was decided the Ninth Circuit had never ruled on the issue. (App. B, at 11a-12a).

[9] Notwithstanding, this Court's holding in *City of Newport*, petitioners by making a motion for judgment as a matter of law at the close of evidence that requested, in the alternative, at least partial judgment on the question of whether it established a prima facie case of discrimination coupled with an alternative jury instruction that recognized this fact and requested that the jury decide the ultimate issue of discrimination; and in specifically objecting to the special verdict form as unduly confusing, met the requirements of Rule 51.

dispute was whether the respondent had proffered a "pretextual" non-discriminatory reason for denying the sewer connection, and the district court found that the petitioners had provided "persuasive evidence" in this regard. (App. E, at 39a) .

The Ninth Circuit recognized that the petitioners circumstantial evidence established a *McDonell-Douglas* prima facie case at trial, but rejected that this evidence compelled a finding of as a matter of law of ultimate discrimination. (App. B, 9a-10a) . True, but it does compel a finding that "the *McDonell-Douglas* framework - with its presumptions and burdens disappeared, and the sole remaining issue [for the jury] was discrimination vel non." *Reeves*, 530 U.S. at 142, 120 S.Ct. at 2106.

It is undisputed that the jury never reached the ultimate question it was required to reach as to whether petitioners established a case for intentional discrimination by respondent refusing to connect the facility to its sewer system. (App. B, at 20a). Rather, the jury made the credibility determinations as to whether petitioners had established a prima facie case - a determination that this Court has instructed is beyond the function and expertise of the jury. *Reeves*, 530 U.S. at 142, 120 S.Ct. at 2106.

Clearly, by not reaching the question that it was required to reach, the district court committed prejudicial error that requires reversal.

In the case at bar, the jury requested clarification on the question of whether petitioners were "qualified" to obtain a sewer connection for their facility, and after clarification from the district court, and answered the question in the negative; thus, it decided the case in favor of respondent.

This is a paradigm example of what the Ninth Circuit itself recognized; that charging the jury with technical elements of the presumptions and shifting burdens have a significant potential to confuse juries. (App. B, at 18a).

Because of the importance of the issue and the serious confusion and split between the circuits, the Court should grant certiorari on this issue if it denies certiorari on Question Number I.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Ninth Circuit judgment be vacated and remanded.

Respectfully submitted,

LAW OFFICES OF FRANK A. WEISER

Frank A. Weiser,
Attorney for Petitioners SMITA SANGHVI
and TARUN SANGHVI

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-56248
D.C. No. CV-97-07629-CM

[Filed July 14, 2003]

SMITA SANGHVI;	)
TARUN SANGHVI,	)
Plaintiffs-Appellants,	)
	)
v.	)
	)
CITY OF CLAREMONT,	)
Defendant-Appellee,	)
	)
and SUZAN SMITH;	)
PAUL HEID; ALGRID LEIGA;	)
DIANN RING;	)
KAREN ROSENTHAL;	)
GLENN D. SOUTHARD,	)
Defendants.	)
	)

Before: HALL, THOMPSON and WARDLAW, Circuit Judges.

ORDER

The panel, as constituted above, has unanimously voted to deny the appellants' petition for rehearing. Judge Wardlaw has also voted to deny their petition for rehearing by the court en banc, and Judges Hall and Thompson have recommended denial of that petition.

The full court has been advised of the petition for court rehearing en banc, and no judge of the court has requested en banc rehearing. See Fed. R. App. P. 35(b).

The petitions for panel rehearing and for rehearing by the court en banc are DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-56248

[Filed May 5, 2003]

This case is reported at 328 F.3d 532 (2003)

SMITA SANGHVI;
TARUN SANGHVI,
Plaintiffs-Appellants,

v.

CITY OF CLAREMONT,
Defendant-Appellee,

and SUZAN SMITH;
PAUL HEID; ALGRID LEIGA;
DIANN RING;
KAREN ROSENTHAL;
GLENN D. SOUTHARD,
Defendants.

Appeal from the United States District Court
for the Central District of California
D.C. No. CV-97-07629-CM
Carlos R. Moreno, District Judge, Presiding

JUDGES: Cynthia Holcomb Hall, David R. Thompson and Kim McLane Wardlaw, Circuit Judges.

OPINION

THOMPSON, Circuit Judge:

Smita and Tarun Sanghvi ("the Sanghvis") wanted to expand their residential Alzheimer's care facility located in an unincorporated area of Los Angeles County ("the County") adjacent to the City of Claremont ("Claremont" or "the City"). To that end, they sought to obtain sewer service from the City. Explaining that it had an existing policy against connecting properties outside its corporate limits to its sewer system unless the property owners agreed to annexation, the City refused to provide the requested service. Additionally, in what the Sanghvis contend were unlawful acts of retaliation, the City took numerous actions opposing the Sanghvis' efforts to expand their facility, including instituting legal action against them and lobbying County officials. The Sanghvis contend that the City's alleged acts of retaliation and the denial of their request for sewer service violated their civil rights and discriminated against handicapped Alzheimer's patients who would reside in their expanded facility. They asserted claims against the City and various City officials (collectively "the City") under 42 U.S.C. § 1983 and the Fair Housing Act ("FHA"), 42 U.S.C. § 3604.[1]

Summary judgment proceedings disposed of all claims except the Sanghvis' FHA claims of discrimination based on disparate treatment, and the City's alleged failure to

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[1] Unless otherwise specified, all further references are to Title 42 of the United States Code.

reasonably accommodate the housing needs of the disabled Alzheimer's patients. Those claims were tried to a jury which returned a verdict in favor of the City. The district court denied the Sanghvis' post-trial motions, and entered judgment in the City's favor. The Sanghvis appeal. They argue that the district court should have granted their motions for judgment as a matter of law or, in the alternative, for a new trial. In support of that argument, they contend they established a prima facie case of discrimination under the framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and no reasonable jury could have failed to find that the City unlawfully discriminated against, and failed reasonably to accommodate the housing needs of, the Alzheimer's patients.

The Sanghvis also argue that the district court erred in its jury instructions and special verdict form, both of which employed the *McDonnell Douglas* formulation for resolving the discrimination issue. In addition, they challenge the district court's summary judgment in favor of the City on their retaliation claim, which judgment the court granted by relying on the *Noerr-Pennington* doctrine. Finally, they contend the district court erred in precluding them from presenting evidence of losses sustained by their closely-held corporation, Mountain View Alzheimer's Center, Inc. ("Mt. View").

We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

I

Motions For Judgment as a Matter of Law and For a New Trial

We review de novo the district court's denial of the Sanghvis' motion for judgment as a matter of law. *Pavao v. Pagay*, 307 F.3d 915, 918 (9th Cir. 2002). We will not reverse the district court's denial of that motion unless, drawing all reasonable inferences in favor of the City, we conclude there was "no legally sufficient evidentiary basis for a reasonable jury to find" in the City's favor. Fed. R. Civ. P. 50(a); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).

We review for abuse of discretion the district court's denial of the Sanghvis' motion for a new trial. *Pavao*, 307 F.3d at 918 (citation omitted). The Sanghvis challenge that ruling on the ground that the jury's verdict was contrary to the clear weight of the evidence.

Having reviewed the record as a whole, we conclude that the district court did not err in denying either motion.

A. Discrimination Claim

To prevail on their discrimination claim under the FHA, the Sanghvis had to prove that the City discriminated against the facility's tenants--Alzheimer's patients--by refusing to connect the Sanghvis' facility to the City sewer system unless the Sanghvis agreed to annexation. 42 U.S.C. § 3604(f)(2)(B)

(2000).[2] In attempting to prove their FHA claim, the Sanghvis presented evidence to establish a prima facie case based on the *McDonnell Douglas* framework,[3] the elements of which, as applied to this case, are:

> (1) plaintiff is a member of a protected class; (2) plaintiff applied for a [sewer connection] and was qualified to receive it; (3) the [sewer connection] was denied despite plaintiff being qualified; and (4) defendant approved a [sewer connection] for a

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[2] The statute makes it unlawful

> [t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of . . . a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available . . . .

42 U.S.C. § 3604(f)(2)(B) (2000).

[3] The *McDonnell Douglas* formula has been extended beyond the *Title VII* context in which it was first developed. It has been applied to claims brought under the FHA, Age Discrimination in Employment Act ("ADEA"), and § 1981. *See, e.g.*, *Gamble v. City of Escondido*, 104 F.3d 300, 305 (9th Cir. 1997) (applying the *McDonnell Douglas* framework to an FHA discrimination claim); *Palmer v. United States*, 794 F.2d 534, 537 (9th Cir. 1986) (applying the *McDonnell Douglas* framework to an ADEA discrimination claim); *Gay v. Waiters' and Dairy Lunchmen's Union, Local No. 30*, 694 F.2d 531, 539 (9th Cir. 1982) (applying the elements of a *McDonnell Douglas* prima facie case to a case of intentional employment discrimination pursuant to § 1981).

> similarly situated party during a period relatively near the time plaintiff was denied its [sewer connection].

Gamble, 104 F.3d at 305 (citations omitted).[4]

The Sanghvis argue that because, on their discrimination claim based on disparate treatment, they made the showing necessary under the *McDonnell Douglas* formulation to survive summary judgment, the district court should have instructed the jury that they had established a prima facie case of discrimination under the FHA. This argument misconstrues the role of the prima facie case in the *McDonnell Douglas* framework.

> "A *McDonnell Douglas* prima facie showing *is not the equivalent of a factual finding of discrimination* . . . . Rather, it is simply proof of actions taken . . . from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations."

Gay, 694 F.2d at 544 n.12 (quoting *Furnco Constr. Corp.*, 438 U.S. at 579-80) (emphasis and first alteration in *Gay*). Thus, the *McDonnell Douglas* inference "*can but need not*

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[4] As the Supreme Court has stated, the *McDonnell Douglas* formula is not to be applied in a "rigid, mechanized, or ritualistic" manner, and there may be cases for which this formulaic showing is not required. *See Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978); *McDonnell Douglas*, 411 U.S. at 802 n.13. However, there is no dispute that a *McDonnell Douglas* prima facie showing was required here.

result in an ultimate judgment for the plaintiff. In other words, a prima facie case under *McDonnell Douglas* is one in which the plaintiff has met his immediate burden of production, but not necessarily his ultimate burden of persuasion." *Gay*, 694 F.2d at 543 n.10 (citing *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253-56, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)) (emphasis added).

During trial, the City produced evidence that, by requiring the annexation of property in exchange for a sewer connection, the City could require property owners to conform their properties to the City's general development plan. Although the City had not enforced its annexation policy before the Sanghvis applied for a sewer connection, City Engineer Craig Bradshaw testified that the reason the City had approved earlier connections without annexation was that theretofore he and other employees in the Engineering Department had been unaware of the annexation policy. Once the City Manager made the Engineering Department employees aware of the policy, it was strictly enforced. The City has not, since then, extended sewer service to properties outside its corporate limits. This evidence supported an inference that the Sanghvis did not qualify to receive a sewer connection, and it supported a finding that the City had a legitimate, non-discriminatory reason for denying a sewer connection to the Sanghvis' property.

When the trial evidence reached this point, "the *McDonnell Douglas* framework--with its presumptions and burdens--[was] no longer relevant." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 510, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993). Although the Sanghvis' circumstantial evidence established a *McDonnell Douglas* prima facie case, meeting

this burden of production simply *permitted but did not compel* the jury to infer the ultimate fact of discrimination. *Id.* at 510-11. The City's burden was to present evidence of a legitimate, nondiscriminatory reason for its actions. Because it did so, it "[did] everything that would be required of [it] if the [Sanghvis] had properly made out a prima facie case." *United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715, 103 S. Ct. 1478, 75 L. Ed. 2d 403 (1983). At that point in the trial, "the *McDonnell-Burdine* presumption 'drops from the case,' " and the fact finder need only address the ultimate question of discrimination. *Id.* (quoting *Burdine*, 450 U.S. at 255 n.10). The jury decided that question in favor of the City. Because the jury's verdict was not against the clear weight of the evidence, the district court properly denied the Sanghvis' motions for judgment as a matter of law and for a new trial on their FHA discrimination claim based on disparate treatment.

B. Reasonable Accommodation

Under the FHA, discrimination includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [a handicapped] person equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B) (2000). "'While a [city] need not be required to make "fundamental" or "substantial" modifications to accommodate the handicapped, it may be required to make "reasonable" ones.'" *City of Edmonds v. Wash. State Bldg. Code Council*, 18 F.3d 802, 806 (9th Cir. 1994) (quoting *Alexander v. Choate*, 469 U.S. 287, 300, 105 S. Ct. 712, 83 L. Ed. 2d 661 (1985)), *aff'd sub nom. City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 115 S. Ct. 1776, 131 L. Ed. 2d 801 (1995) (alterations in *Wash. State*).

The Sanghvis presented no evidence from which the jury could conclude that the requested accommodation was an accommodation required by the Alzheimer's patients. It was an accommodation sought by the Sanghvis for their personal benefit. They wanted a sewer hook-up without annexation because they did not want to incur the added cost of complying with the City's building requirements. This was an economic concern of the Sanghvis, not a therapeutic concern of the Alzheimer's patients. *See Brandt v. Village of Chebanse*, 82 F.3d 172, 174-75 (7th Cir. 1996) (holding that no grant of a variance from single family zoning was necessary where developer had not shown that her proposed four-unit complex, of which two units would be handicapped-accessible, was for therapeutic rather than economic reasons).

The Sanghvis' reasonable accommodation claim fails because there was a "legally sufficient basis for a reasonable jury to find" in the City's favor. Fed. R. Civ. P. 50(a).

II

Jury Instructions and Special Verdict Form

The Sanghvis argue that the district court erred in its jury instructions and special verdict form, both of which set out the *McDonnell Douglas* burden-shifting framework.[5]

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[5] Relying on the *McDonnell Douglas* formulation, the district court instructed the jury in relevant part:

> Plaintiffs claim a violation of the Fair Housing Act for intentional discrimination based upon defendants' opposition to the facility before Los Angeles County and

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the California Regional Water Quality Control Board and defendants' implementation of its sewer policy.

For this claim, plaintiffs have the burden of proving each of the following elements by a preponderance of the evidence to establish their prima facie case:

1. Plaintiffs are members of a protected class.

2. Plaintiffs applied for a sewer connection and were qualified to receive it.

3. The sewer connection was denied despite plaintiffs being qualified.

~~5~~ [¶]4. Defendants or the other governmental entities approved sewer connections for similarly situated persons during a period relatively near the time plaintiffs were denied its sewer connection.

If you should find that plaintiffs failed to prove any of the above listed elements, your verdict should be for the defendant on plaintiffs' claim for violations of the Fair Housing Act based on disparate treatment.

If plaintiffs establish their claim of a violation of the Fair Housing Act based on intentional discrimination, defendant must present evidence of some legitimate, nondiscriminatory reason for its actions.

If you find that the defendant failed to present evidence of a legitimate, nondiscriminatory reason for its action, your verdict should be for the plaintiffs on the violation of the Fair Housing Act based on disparate treatment.

If the defendant articulates a legitimate, nondiscriminatory reason for its actions, plaintiff must then prove by a preponderance of the evidence that the defendants' reasons for its actions is a mere pretext to discrimination.

If the plaintiffs fail to prove by a preponderance of the evidence that the reason asserted by the defendant is a mere pretext to discrimination, your verdict should be for the defendant on the claim of violation of the Fair Housing Act based on disparate treatment.

In reaching this conclusion, you may consider the evidence establishing plaintiffs' prima facie case and all reasonable inferences drawn therefrom on the issue of whether defendants' explanation is pretextual.

The special verdict form given to the jury tracked the jury instructions, asking in relevant part:

Question No. 1: Did plaintiffs apply for a sewer connection with the defendant for which plaintiffs were qualified to receive?

Answer "yes or "no."

If you answer Question No. 1 "no," then go directly to Question No. 6. If you answer Question No. 1 "yes," then answer Question No. 2.

Question No. 2: Was the sewer connection denied to plaintiffs despite plaintiffs being qualified for the connection?

Answer "yes or "no."

If you answer Question No. 2 "no," then go directly to Question No. 6. If you answer Question No. 2 "yes," then answer Question No. 3.

Question No. 3: Did defendant approve sewer connections for similarly situated parties during a period relatively near the time plaintiffs were denied their sewer connection?

Answer "yes or "no."

If you answer Question No. 3 "no," then go directly to Question No. 6. If you answer Question No. 3 "yes," then answer Question No. 4.

Question No. 4: Did defendant establish a legitimate, non-discriminatory reason for its denial of the sewer connection?

Answer "yes or "no."

If you answer Question No. 4 "no," place a "Not Applicable" in the answer to Question No. 5 and then go directly to Question No. 6. If you answer Question No. 4 "yes," then answer Question No. 5.

Question No. 5: Have plaintiffs shown by a preponderance of the evidence that defendant's legitimate, non-discriminatory reason for its refusal to connect plaintiffs' facility to the sewer was a pretext to discrimination?

Although we have never directly addressed the question of the propriety of the use of the *McDonnell Douglas* framework in jury instructions and special verdict forms, we have stated that "it is not normally appropriate to introduce the *McDonnell Douglas* burden-shifting framework to the jury." *Costa v. Desert Palace, Inc.*, 299 F.3d 838, 855 (9th Cir. 2002) (en banc), *cert. granted*, 537 U.S. 1099, 123 S. Ct. 816, 154 L. Ed. 2d 766 (2003).

A majority of our sister circuits concur in this view, although none has found the error substantial enough to warrant reversal. Some decisions criticize any use of the *McDonnell Douglas* formulation in instructing the jury, emphasizing that the only question that should go to the jury is the ultimate question of discrimination; other circuits condemn the use of legalistic language and the complexities of burden shifting without rejecting the *McDonnell Douglas* framework outright. *See Cabrera v. Jakabovitz*, 24 F.3d 372, 380-82 (2d Cir. 1994) (holding that, although a jury instruction that included the phrase "*prima facie* case" and referred to "defendant's 'burden' of produc[tion]" "created a distinct risk of confusing the jury," in certain instances it would be appropriate to instruct the jury on the elements of a prima facie case); *Watson v. Southeastern Pa. Transp. Auth.*, 207 F.3d 207, 221-222 (3d Cir. 2000) (holding that, although it is proper "to instruct the jury that it may consider whether the factual predicates necessary to establish the prima facie case have been shown," it is error to instruct the jury on the *McDonnell Douglas* burden shifting scheme), *cert. denied*, 531 U.S. 1147, 121 S. Ct. 1086, 148 L. Ed. 2d 961 (2001);

Answer "yes or "no."

Mullen v. Princess Anne Vol. Fire Co., 853 F.2d 1130, 1137 (4th Cir. 1988) (noting that the "shifting burdens of production of *Burdine* . . . . are beyond the function and expertise of the jury" and are "overly complex"); *Walther v. Lone Star Gas Co.*, 952 F.2d 119, 127 (5th Cir. 1992) ("Instructing the jury on the elements of a prima facie case, presumptions, and the shifting burden of proof is unnecessary and confusing. Instead, the court should instruct the jury to consider the ultimate question of whether defendant terminated plaintiff because of his age."); *Ryther v. KARE 11*, 108 F.3d 832, 849-50 (8th Cir. 1997) (en banc) (Loken, J., in Part II. A. of the dissent, which a majority of the court joined) (holding that "the jury need only decide the ultimate issue of intentional discrimination," and usually need not make findings on the prima facie case or whether the defendant's explanation is pretextual); *Dudley v. Wal-Mart Stores, Inc.*, 166 F.3d 1317, 1322 (11th Cir. 1999) ("We stress that it is unnecessary and inappropriate to instruct the jury on the *McDonnell Douglas* analysis.").[6]

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[6] The First, Seventh, and Tenth Circuits also appear to disapprove of the wholesale adoption of the *McDonnell Douglas* formulation in jury instructions. *See Loeb v. Textron*, Inc., 600 F.2d 1003, 1016-18 (1st Cir. 1979) (explaining that, while the phrase "prima facie case" and other "legal jargon" need not be read to the jury, whether jury instructions should include "the four elements of the *McDonnell Douglas*-type prima facie case (properly tailored to the circumstances) and that the employer's reason is a pre-text" will depend upon the evidence presented), *disapproved of on other grounds by Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 126 n.19, 105 S. Ct. 613, 83 L. Ed. 2d 523 (1985); *Gehring v. Case Corp.*, 43 F.3d 340, 343 (7th Cir. 1994) ("Once the judge finds that the plaintiff has made the minimum necessary

In contrast, only one circuit has not disparaged the use of the *McDonnell Douglas* framework in jury instructions. *See Gafford v. Gen. Elec. Co.*, 997 F.2d 150, 167 & n.9 (6th Cir. 1993) (holding that it was not error to "guid[e] the jury through a three-stage order of proof as opposed to instructing solely on the ultimate issue of sex discrimination").

Having considered the views and observations of this and other circuits, we conclude that it is error to charge the jury with the elements of the *McDonnell Douglas* prima facie case.

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demonstration (the 'prima facie case') and that the defendant has produced an age-neutral explanation, the burden-shifting apparatus has served its purpose, and the only remaining question--the *only* question the jury need answer--is whether the plaintiff is a victim of intentional discrimination."); *Messina v. Kroblin Transp. Sys., Inc.*, 903 F.2d 1306, 1308 (10th Cir. 1990) ("The *McDonnell Douglas* inferences . . . are of little relevance to the jury."); *but see Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194, 200 (1st Cir. 1987) ("[T]he district court was correct in using the [*McDonnell Douglas*] framework in the instructions to the jury" because "[i]t is a straightforward way of explaining how to consider whether there is intentional discrimination."), *abrogated on other grounds by Iacobucci v. Boulter*, 193 F.3d 14, 27 (1st Cir. 1999); *Lynch v. Belden & Co.*, 882 F.2d 262, 269 (7th Cir. 1989) ("[I]t was proper for the district court to instruct the jury as to the *McDonnell Douglas/Burdine* formula for evaluating indirect evidence . . . . [Such an instruction] accurately informed the jury of the parties' burdens . . . ." (footnote omitted)); *Faulkner v. Super Valu Stores, Inc.*, 3 F.3d 1419, 1425 & n.3 (10th Cir. 1993) (holding that there was no error in a jury instruction that incorporated the entire *McDonnell Douglas* formulation because it set forth the proper allocation of proof and directed the jury that age must be the determinative factor in the failure to hire).

The technical elements of the presumptions and shifting burdens have significant potential to confuse juries. *See Costa*, 299 F.3d at 855.

Moreover, "at [the jury] stage, the framework unnecessarily evades the ultimate question of discrimination *vel non*." *Id.* at 855-56, quoting *Aikens*, 460 U.S. at 714. Instead of burdening the jury with the details of a framework designed to allocate burdens and promote the orderly presentation of evidence, district courts should focus the fact finders on the one essential question: whether the plaintiff is a victim of intentional discrimination.[7] *Aikens*, 460 U.S. at 716; *Gehring*, 43 F.3d at 343.

In the present case, however, the Sanghvis waived their challenge to the instruction the district court gave by failing to object to it. *See Fed. R. Civ. P. 51*. Moreover, they requested an alternative instruction of their own that incorporated the *McDonnell Douglas* three-step burden shifting analysis.

With regard to the special verdict form, the Sanghvis objected in the district court to questions one through five, stating that those questions were likely to confuse the jury on the discrimination and accommodation issues. Their objection, however, did not alert the district court to the *McDonnell Douglas* issue. In an attempt to raise that issue in this appeal, they recast their objection to the special verdict

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[7] For reference purposes only, *see* Manual of Modern Civil Jury Instructions for the District Courts of the Ninth Circuit, Instruction No. 12.1 (2001).

form citing *Watson*, 207 F.3d at 221, for the proposition that "the technical aspects of the *McDonnell/Burdine* burden shifting" framework are confusing. Because the Sanghvis failed to make this objection in the district court, they waived it insofar as they now contend it was error to employ the *McDonnell Douglas* framework. They have not waived, however, their contention that the special verdict form was confusing. As to that contention, we conclude that any possible error was harmless.

Although questions one through five incorporated elements of the *McDonnell Douglas* framework, there was abundant evidence that the City denied the sewer connection for reasons other than intentional discrimination against the handicapped. Thus, any confusion that *may* have been engendered by the inclusion of questions modeled on the *McDonnell Douglas* factors was harmless, and did not constitute reversible error. *See Cancellier v. Federated Dept. Stores*, 672 F.2d 1312, 1316-17 (9th Cir. 1982) (citations omitted) (holding that where the record convincingly rebuts any presumption of prejudice, an instruction that does not misstate the law, but is less clear than it ought to be, is harmless).

The Sanghvis argue, however, that the jury was in fact confused, as demonstrated by a question the jury submitted to the court during deliberations. The jury asked: "Re: Questions 1 & 2, what is meant by 'qualified'? Who or what agency qualified [the Sanghvis] for sewer connection?" Answering this question, the court explained: " 'Qualified,' as used in these instructions, means whether Plaintiffs were similarly situated as other persons outside the City who received sewer hook-ups. The City of Claremont was the sole

agency which could qualify Plaintiffs for a sewer connection." The Sanghvis do not contend that this explanation was erroneous. Instead, they argue the fact that the jury sought clarification proves the jury was confused, and as a result they are entitled to a new trial. We disagree.

The jury's request for clarification of the term "qualified" does not reflect confusion with the special verdict form or with the court's instructions. Rather, it reflects a jury focused on the threshold issue of whether the Sanghvis qualified for a sewer connection. The court's responsive instruction answered that inquiry. Given the parties' conflicting evidence regarding the existence and application of the City's annexation policy, it was appropriate for the jury to determine, consistent with the district court's explanatory instruction, whether or not the Sanghvis met the threshold requirement of qualifying for a sewer connection. *See, e.g.*, *Lynn v. Regents of the Univ. of Cal.*, 656 F.2d 1337, 1345 (9th Cir. 1981) (recognizing that "it should make little difference to the outcome" whether the defendant's evidence was analyzed at step one, to determine whether the plaintiff was qualified to receive tenure or at step two, to determine whether the defendant had a legitimate, nondiscriminatory reason for denying tenure). Moreover, regardless whether the jury determined, as it did, that the Sanghvis were not qualified to receive the sewer connection or, as it could have, that the City had a legitimate, nondiscriminatory reason for denying the connection, the weight of the evidence simply does not support a conclusion that the sewer connection was denied based on impermissible discrimination against the handicapped.

Neither the court's jury instructions nor the special verdict form require reversal in this case.

III

Summary Judgment -- The Retaliation Claim

Relying upon the *Noerr-Pennington* doctrine, the district court granted summary judgment in favor of the City on the Sanghvis' retaliation claims. We affirm that judgment.

The *Noerr-Pennington* doctrine, first enunciated in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961), immunizes from liability under the *Sherman Act* two or more persons working together to attempt to persuade the government to take particular legislative or executive action, even when such activity would create a restraint of trade. *Id.* at 136. This exception is grounded in our democratic form of government:

> The right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws cannot properly be made to depend upon their intent in doing so. It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors.

Id. at 139.

In *Manistee Town Center v. City of Glendale*, we extended this immunity to petitioning activity by a municipality and its officials. 227 F.3d 1090, 1093-94 (9th Cir. 2000). There, a municipality and its officials lobbied to prevent particular tenants from leasing space in the plaintiff's shopping center, preferring that the space be rented to a large commercial retailer instead of public entities. *Id.* at 1091-92. The lobbying efforts included writing letters to nearby residents, urging the local press to print articles, and lobbying County officials. *Id.* at 1092. We determined that extending immunity to the municipality and its officials was consistent with the representative democracy rationale of the *Noerr-Pennington* doctrine, reasoning that "[t]his kind of petitioning may be nearly as vital to the functioning of a modern representative democracy as petitioning that originates with private citizens." *Id.* at 1093.

The district court correctly applied *Manistee* in granting summary judgment in favor of the City on the Sanghvis' retaliation claims. The City and its officials opposed the expansion of the Sanghvis' facility by lobbying other public officials, including state legislators and members of the County Board of Supervisors and by filing suit against the Sanghvis and the Los Angeles Regional Water Quality Control Board (which had allowed the Sanghvis' facility to operate with a septic tank during the initial years of its expansion). These petitioning activities fall within the protective ambit of *Noerr-Pennington*.

The Sanghvis argue we should apply the "sham" exception to the *Noerr-Pennington* doctrine. We disagree. That exception applies when "a publicity campaign, ostensibly directed toward influencing governmental action, is a mere

sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." *Id.* at 1094 (quoting *Noerr*, 365 U.S. at 144). There is no evidence in this case to suggest the applicability of the "sham" exception. The district court did not err in granting summary judgment in favor of the City on the Sanghvis' retaliation claim by relying on the *Noerr-Pennington* doctrine.

IV

Conclusion

The jury's verdict in favor of the City was not contrary to the clear weight of the evidence. The district court did not err in denying the Sanghvis' motions for judgment as a matter of law and for a new trial. Neither the district court's jury instructions nor its use of the special verdict form require reversal in this case. Summary judgment was properly granted in favor of the City on the Sanghvis' retaliation claim. AFFIRMED.[8]

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[8] The Sanghvis' evidence of losses incurred by Mt. View, their closely-held corporation, was properly excluded because Mt. View is not a party to this action. *Erlich v. Glasner*, 418 F.2d 226, 228 (9th Cir. 1969).

APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 97-7629 CM (CTX)

[Filed June 26, 2001]

SMITA SANGHVI;	)
TARUN SANGHVI,	)
Plaintiffs,	)
	)
v.	)
	)
CITY OF CLAREMONT;	)
SUZAN SMITH;	)
PAUL HEID; ALGRID LEIGA;	)
DIANN RING;	)
KAREN ROSENTHAL;	)
GLENN D. SOUTHARD;	)
and DOES 1 through 100,	)
Defendants.	)
	)

ORDER DENYING PLAINTIFFS' MOTION FOR JUDGMENT AS A MATTER OF LAW OR FOR A NEW TRIAL

Presently before the Court is Plaintiffs Tarun and Smita Sanghvi's Motions for Judgment as a Matter of Law or, in the

alternative, for a new trial. Having read the moving papers, the opposition, and the reply, the Court hereby denies Plaintiffs' Motions for the following reasons.

I.

Applicable Standard

The Supreme Court has recently observed that the standard for a motion as a matter of law is identical to a motion for summary judgment. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000). Federal Rule of Civil Procedure 56 (c) states:

> The judgment sought shall be rendered forthwith if the pleadings, dispositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

When reviewing the evidence on a motion for summary judgment, the evidence of the non-moving party is to be believed and all justifiable inferences are to be drawn in her favor. *See, e.g. Jordan v. Northrop Grumman Corp.*, 63 F. Supp.2d 1145, 1154 (C.D. Cal. 1999).

As mentioned, Plaintiffs also move for a new trial. The Ninth circuit has recently instructed that "a trial court may grant a new trial if 'the verdict is contrary to the clear weight of the evidence, or is based upon evidence which is false, or to prevent, in the sound discretion of the trial court, a miscarriage of justice.'" *Silver Sage Partners Ltd. v. City of*

Desert Hot Springs, 2001 WL 585539 (9th Cir. June 1, 2001) citation omitted).

II.

Discussion

Plaintiffs moved once before for judgment as a matter of law, just after the Jury rendered its verdict, and the motion was denied. Plaintiffs do not identify any reason why they are entitled to renew their Motion here. But even on the merits, Plaintiffs' Motion must be denied.

The jury found that Plaintiffs failed to establish a *prima facie* case, answering no to the question of whether Plaintiffs applied for a sewer connection for which they were qualified. In response, Plaintiffs cite *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983). In that case, the Supreme Court criticized the Court of Appeals for focusing on whether plaintiff had made out a prima facie case when the real question, on appeal from a full trial on all the evidence, was whether a plaintiff had proved discriminatory intent. *Id.* at 481. However, *Equal Employment Opportunity Commission v. Inland Marine Indus.*, 729 F.2d 1229 (9th Cir. 1984) makes clear that no error was committed here.

In *Inland Marine*, the district court entered judgment in plaintiff's favor and framed its decision in terms of finding a prima facie case. *Inland Marine* concluded the district court had committed no error, and its decision was not in conflict with *Aikens*, stating, "[t]o the extent the district court spoke of finding a prima facie case, it did so because this Circuit requires district courts to provide such specific findings in

Title VII cases.[1] *Id.* at 1235. Here, Plaintiffs found no prima facie case was established, and consistent with Ninth Circuit precedent, the Court concludes no error was committed in reaching that decision. However, even if the jury's verdict were somehow in error, the Court finds that Plaintiffs have failed to identify material uncontested facts that entitle them to Judgment as a matter of law on their disparate treatment claim.

Plaintiffs have also failed to identify any material uncontested facts to warrant judgment as a matter of law on their reasonable accommodations claim. The facts Plaintiffs identify in their papers are either not material or undisputed, and thus Plaintiffs are not entitled to judgment as a matter of law.

As for Plaintiffs motion for a new trial, the Court finds that there was no "miscarriage of justice" and the evidence was not contrary to the clear weight of the evidence. *See Silver Sage Partners Ltd.* Thus, Plaintiffs' Motion for a new trial is denied.

IV.

Conclusion

For the reasons stated above, the Court denies Plaintiffs' Motion for Judgment as a Matter of Law or for a new trial.

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[1] The same test used for Title VII cases applies to claims under the Fair Housing Act. *See Gamble v. City of Escondido*, 104 F.3d 300, 304 (9th Cir. 1996).

DATED: June 26, 2001 /s/ _____
Carlos R. Moreno
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV-97-7629 CM (CTX)
[Consolidated with Case No. 99-05343 CM (Aux)]
Judge: Carlos R. Moreno

[Filed June 4, 2001]

SMITA SANGHVI;	)
TARUN SANGHVI,	)
Plaintiffs,	)
	)
v.	)
	)
CITY OF CLAREMONT;	)
SUZAN SMITH;	)
PAUL HEID; ALGRID LEIGA;	)
DIANN RING;	)
KAREN ROSENTHAL;	)
GLENN D. SOUTHARD;	)
and DOES 1 through 100,	)
inclusive	)
Defendants.	)
	)

~~[PROPOSED]~~ JUDGMENT AFTER TRIAL BY JURY

This action came on regularly for jury trial before the Court on May 17, 2001, the Honorable Carlos Moreno, District Court Judge presiding. A jury of eight persons was impaneled and sworn. Witnesses were sworn and testified. After hearing the evidence and the arguments of attorneys, the jury was instructed by the Court and retired to consider its verdict. On May 29, 2001, the jury returned a unanimous special verdict against Plaintiffs Smita Sanghvi and Tarun Sanghvi and in favor of Defendant City of Claremont on all claims.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiffs Smita Sanghvi and Tarun Sanghvi take nothing by their Second Amended Complaint for Violation of Federal Civil Rights, etc., dated August 28, 2000, that judgment be entered against Plaintiffs and in favor of Defendant City of Claremont on the merits, and that Defendant recover its costs of suit incurred here in the amount of $_____.

DATED: June 4, 2001 /s/ _____
Carlos R. Moreno
United States District Court

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. 97-7629 CM (CTX)

[Filed March 26, 2001]

SMITA SANGHVI;	)
TARUN SANGHVI,	)
Plaintiffs,	)
	)
v.	)
	)
CITY OF CLAREMONT;	)
SUZAN SMITH;	)
PAUL HEID; ALGRID LEIGA;	)
DIANN RING;	)
KAREN ROSENTHAL;	)
GLENN D. SOUTHARD;	)
and DOES 1 through 100,	)
inclusive	)
Defendants.	)
	)

ORDER GRANTING AND DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT OR IN THE ALTERNATIVE SUMMARY ADJUDICATION

Presently before the Court is Defendant City of Claremont's Motion for Summary Judgment or in the alternative Summary Adjudication brought pursuant to 56 (b).[1] Having read the moving papers, the opposition, and the reply, as well as all admissible evidence, the Court hereby grants and denies Defendant's Motion for the following reasons.

I.

Factual Background

Plaintiffs, Smita and Tarun Sanghvi, filed their Second Amended Complaint on August 28, 2000. The allegations and supporting evidence thereto are as follows.

Plaintiffs purchased property at 715 West Baseline Road in the County of Los Angeles immediately adjacent to the City of Claremont. On June 25, 1992, Plaintiffs petitioned the County for a Conditional Use Permit for the construction and operation of a forty-person Alzheimer's care facility. When the proposal came up for hearing on December 2, Defendant opposed it based on water quality and land use concerns. The project was then reduced in size by Plaintiffs to a twenty-person facility, which was later approved by the County.

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[1] The remaining Defendants are to be dismissed by stipulation.

On December 2, 1993, the Los Angeles County Board of Supervisors affirmed the Planning Commission's approval and requested that the City permit the facility to connect to the City's sewer system. In or around that time, the City made clear it would not connect its sewer system to any property, such as Plaintiffs' that is outside City limits. As an alternative to a Sewer connection, Plaintiffs obtained permission to utilize a septic tank. Later, in 1997, Plaintiffs were informed that they could connect to the sewer system if they agreed to annex to the City and thereby fall within the City's more restrictive regulations. The evidence shows, however, that between 1989 and 1992 at least seven other properties outside City limits, successfully connected to the City's sewer system and continue to receive service to date.

On May 20, 1998, the California Department of Social Services ("DSS") shut down the facility for violating California's laws governing patient care. The evidence shows that the City assisted DSS in collecting information on the facility. The facility re-opened on August 14, 1998. Finally. in 2000, Plaintiffs obtained permission from the County to expand the facility to house eighty Alzheimer's patients.

II.

Applicable Standard

Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In a trilogy of 1986 cases, the Supreme Court clarified

the applicable standards for summary judgment. *See Celotex Corporation v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Electrical Industry Co. V. Zenith Radio Corp.*, 475 U.S. 574 (1986).

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Anderson*, 477 U.S. at 256. Whether a fact is material is determined by looking to the governing substantive law; if the fact may affect the outcome, it is material. *Id.* at 248. If the moving party seeks summary adjudication with respect to a claim or defense upon which it bears the burden of proof at trial, its burden must be satisfied by affirmative, admissible evidence. By contrast, when the non-moving party bears the burden of proving the claim or defense, the moving party can meet its burden by pointing out the absence of evidence submitted by the non-moving party. The moving party need not disprove the other party's case. *See Celotex*, 477 U.S. at 325.

III.

Discussion

Plaintiffs bring two separate claims. First, is a claim for relief under 42 U.S.C. § 1983; the second arises under the Federal Housing Act, 42 U.S.C. § 3604 (b). Defendant proffers different defenses and asks the Court to enter summary judgment.

A. Section 1983

This claim essentially arises from the fact that Defendant improperly caused the closure of Plaintiff's facility. Specifically, Plaintiffs allege that Defendant had a direct role in closing their facility for alleged violations of state laws regarding safety to facility patients. *See* SAC at ¶¶ 23, 31. Defendant's employees worked undercover and reported violations to the State. Moreover, Defendant's actions were "pretextual and [] the real reason was to retaliate against Plaintiffs for exercising their constitutional rights." *See* SAC at ¶ 31.

In response, Defendant argues that it is immune from liability under the Noerr-Pennington Doctrine. Under that doctrine, one who petitions a governmental entity to take a specific action is immune from any statutory violations.[2] The Ninth Circuit has stated that the "Noerr-Pennington doctrine ensures that those who petition the government for redress of grievances remain immune from liability for statutory violations, notwithstanding the fact that their activity might otherwise be proscribed by the statute involved." *White v. Lee*, 227 F.3d 1214, 1231 (9th Cir. 2000)(citations omitted). The doctrine includes within its scope governmental entities and their officials. *See Manistee Town Center v. City of Glendale*, 227 F.3d 1090, 1093 (9th Cir. 2000).

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[2] The Ninth Circuit instructs that although the "doctrine originally arose in the antitrust context, it is based on and implements the First Amendment right to petition..." *White v. Lee*, 227 F.3d 1224, 1231 (9th Cir. 2000).

There is, however, an exception to the Noerr-Pennington doctrine. The concept of the exception is that "'[t]here may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor...'" *Id.* at 1094 (citing) *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 355 U.S. 127, 144 (1965). *Manistee* made clear that the sham exception applies when the harm is caused by abuse of process as opposed to the outcome of the process.

Defendant concludes they are immune from liability because "the minimal contact the City had with the [Department of Social Services] regarding the Facility . . . is a protected form of speech under the First Amendment." *See* Motion at p. 9. Plaintiffs present extremely few facts connecting Defendant with DSS. After DSS closed the facility, a DSS supervisor informed Plaintiff the he would check with the City on whether the facility's library could remain open.[3] *See* S. Sanghvi Decl. At ¶ 34. Another DSS employee informed Plaintiffs that "DSS has spent numerous hours with the City regarding the facility's closure." *Id.* at ¶ 35. Plaintiffs also cite as support statements made by a city planner that lack of access to a sewer line will keep the facility from "becoming a reality" and if a septic plant cannot be accommodated at the facility, the "project is killed." *See* Pls' Statement of Genuine Issues at ¶¶ 9, 16.

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[3] At oral argument, Plaintiffs acknowledged this was the strongest fact supporting their claim for retaliation.

The Court finds the Noerr-Pennington doctrine immunizes Defendant's limited petitioning. The extremely limited facts presented by Plaintiffs, moreover, do not demonstrate any abuse of process that establish the sham exception. Plaintiffs also argue that *Manistee*'s extension of the doctrine to governmental entities "is shady at best." *See* Opp'n at p. 25. Plaintiffs' argument is misplaced because neither case they cite even discusses the Noerr-Pennington doctrine as it applies to municipalities. Thus, the Court abides by the express ruling in *Manistee*.[4] For all the above reasons, Plaintiffs' claim must be dismissed.

B. FHA claim

Plaintiffs second claim arises out of allegations that Defendant's acts have "had the effect of discriminating against intended tenants and the occupants of Plaintiffs' property because of their handicapped status as victims of Alzheimer's disease." *See* SAC at ¶ 42. A FHA violation may be established by either disparate treatment or disparate impact. *See e.g. Bangerter v. Oren City Corp.*, 46 F.3d 1491 (10th Cir. 1995). Disparate treatment may be demonstrated through direct evidence of discriminatory intent or a three-stage test discussed further below.

Despite presenting a variety of facts, Plaintiffs have failed to establish an express discriminatory motive against patients with Alzheimer's. Plaintiffs cite, for example, Defendant's

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[4] Plaintiffs also argue that the immunity defense is not properly raised because it was not plead as a defense in the Answer. However, Plaintiffs have not identified in their papers any specific prejudice resulting from pleading this defense.

opposition to the project throughout the planning stage. The Court believes the City's opposition does not amount to evidence of discriminatory motive. Second, the fact that the City's sewer policy was not codified or that City officials did not know about it, by itself, is not evidence of a discriminatory motive. Similarly, the fact that the City hooked up other properties to its sewer system, but not Plaintiffs', is not evidence of discrimination or stereotyping against Alzheimer's patients. The same can be said about the Council members' statements that the facility was "a filthy operation and should be shut down" and that it would not be open for business. *See* Pls' Statement of Genuine Issues at ¶ 59. It is unclear how these comments may be regarded as discriminatory against Alzheimer's patients.

Plaintiffs argue in the alternative, that there is evidence of indirect discrimination. In particular, they argue that 1) the facility represents a protected class; 2) the facility was denied sewer services unless they annexed to the City; and 3) other County properties were provided sewer services without annexing. *See* Op'n at p. 16. To determine whether indirect discrimination is established, courts employ the following analysis: 1) plaintiff has the burden of proving a prima facie case; 2) if plaintiff establishes a prima facie case, defendant has the burden of articulating a legitimate, non-discriminatory reason for its actions; and 3) if defendant satisfies its burden, plaintiff must prove by a preponderance of the evidence that defendant's reason is pretextual. *See Gamble v. City of Escondido*, 104 F.3d 300, 305 (9th cir. 1997).

There appears to be no dispute that Plaintiffs have established a prima facie case; rather, at issue is whether Defendant has presented a legitimate non-discriminatory

reason for its actions which Plaintiffs have failed to rebut. Defendant explains that it provided services to other County properties mistakenly. It further states that a City employee "was not aware of the sewer policy" thus "he mistakenly hooked up properties without requiring annexation." *See* Reply at 5-6. The reason the connections remain is that "these individuals relied on the City's mistake to obtain a sewer connection, and the City cannot simply unhook their properties. The City took the proper action by requiring these owners to pay for their share of the upkeep of the sewer." *See* Reply at 6. Defendant does not cite specific evidence to support the above conclusions.

By contrast, the Court finds that Plaintiffs have presented persuasive evidence that Defendant's proffered non-discriminatory reason is pretextual. in 1997, the Mayor of Claremont conditioned access to the sewer system on Plaintiffs' annexation to the City. At the same time, other properties outside the City were receiving service, and still continue to receive service. It also appears that the City began to require properties to annex in order to receive service only when Plaintiffs requested service for their facility. Finally, on or about the same day, Plaintiffs' application for a use permit was heard by the County, and objected to by Defendant, a property outside the City limits received a permit to hook up to the City's sewer service. The Court therefore finds that Plaintiffs have presented sufficient evidence to show the proffered reason is pretextual, and summary adjudication as to this claim is denied.

FHA imposes an "affirmative duty" to make reasonable accommodations on behalf of handicapped persons. 42 U.S.C. 3604 (f) (3) (B). In particular, this section requires

governmental entities to issue variances for valid regulations to ensure that housing is available for disabled persons on the same basis as it is available to others without disabilities. *See e.g. Oxford House, Inc. v. Babylon*, 819 F. Supp. 1179, 1186 (E.D.N.Y. 1993). Plaintiffs argue Defendant could have connected the facility to the sewer line and required payment of past maintenance fees like other properties outside the City. While Defendant argues connecting other County properties was a mistake, the Court believes whether in fact there was a mistake is a material issue of dispute fact. Accordingly, the legal question of whether reasonable accommodation in the form of a hook-up should be made to Plaintiffs, may proceed to trial.

Plaintiffs' disparate impact claim, however, must be dismissed. In *Gamble* the Ninth Circuit held plaintiff failed to establish a prima facie claim for disparate impact. The court stressed that plaintiff "has presented no statistics or other proof demonstrating" that the City's neutral practices have a significant adverse or disproportionate impact. *Gamble*, 104 F.3d at 306. Similarly, Plaintiffs have not presented any facts to show the City's neutral policies have a significant adverse effect on Alzheimer's patients. Summary adjudication is also granted to the extent that the FHA claims depend on the City's petitioning DSS.

C. Standing

As a last resort, Defendant argues that Plaintiffs lack standing. In its Motion, Defendant argues there is no standing because all the harm at issue is to the corporation. Plaintiffs, however, have submitted evidence that they have a personal interest in the facility, thus closing it down harms them as

individuals as well. *See* T. Sanghvi Decl. at ¶ 3. Defendant changes course in its Reply and argues that the corporation lacks standing because it has been suspended. This argument is irrelevant because the corporation is not the plaintiff in this action.

IV.

Conclusion

For all the above reasons, the Court grants Defendant's Motion for Summary Adjudication as to the Section 1983 claim. Defendant's Motion for Summary Adjudication of the FHA claim is granted as to the disparate impact and retaliatory claims, but denies as to the disparate treatment claim.

IT IS SO ORDERED,

DATED: March 26, 2001 /s/ _____
Carlos R. Moreno
United States District Court

(2)

Supreme Court, U.S.
FILED
DEC 30 2003
OFFICE OF THE CLERK

No. 03-570

In the Supreme Court of the United States

SMITA SANGHVI; TARUN SANGHVI,
Petitioners,

v.

CITY OF CLAREMONT,
Respondent.

On Petition for Writ of Certiorari To The United States Court of Appeals for the Ninth Circuit

PETITION FOR REHEARING

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411 U.S. 792, 93 S.Ct. 1817,
36 L. Ed.2d 668 (1973) 1, 3, 4, 5

Reeves v. Sanderson Plumbing Products, Inc.,
530 U.S. 133, 120 S.Ct. 2097,
147 L. Ed.2d 105 (2000) 4

Texas Dep't of Community Affairs v. Burdine,
450 U.S. 248, 101 S.Ct. 1089,
67 L. Ed.2d 207 (1981) 1

United States Postal Service Board of Governors v. Aikens,
460 U.S. 711, 103 S.Ct. 1478,
75 L. Ed.2d 403 (1983) 4

Rules:

Federal Rule of Civil Procedure 51 . . . . . 1, 2, 3, 4
Federal Rule of Civil Procedure 51(d)(2) 1, 2, 5

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI

Petitioners Smita Sanghvi and Tarun Sanghvi respectfully move, pursuant to Rule 44.2 of the Supreme Court Rules, for rehearing on their Petition for Writ of Certiorari as to the second question presented for review-whether it was reversible error for the district court to instruct the jury on the burden of production framework enunciated by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L. Ed.2d 668 (1973) and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 67 L. Ed.2d 207 (1981)? In support thereof, Petitioners make the following argument: Effective December 1, 2003, approximately one week prior to this Court's Order on December 8, 2003 denying the Petition for Writ of Certiorari, *Federal Rule of Civil Procedure* 51 was amended to allow a court to consider a plain error in the jury instructions affecting substantial rights that has not been preserved as otherwise required under the rule. *Federal Rule of Civil Procedure* 51(d)(2). The Ninth Circuit Opinion agreed with Petitioners' contention on appeal that the district court erred in its jury instructions and special verdict form, both of which set out the *McDonnell Douglas* burden-shifting framework, but found that the Petitioners waived their challenge to the instructions by failing to object at trial under Rule 51. The Ninth Circuit's well-established case law at the time that the case was decided foreclosed review of the jury instructions under the "plain error" doctrine. Pursuant to this Court's Order dated March 27, 2003, newly amended Rule 51 shall take effect on December 1, 2003, and "shall govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending." There are no impediments barring a federal court's exercise of its

equitable discretion to permit Petitioners the benefit of the newly adopted rule.

I. This Court should grant the Petition for Rehearing based on the unique intervening circumstances of the adoption of newly amended Federal Rule 51 that now permits application of the "plain error" doctrine to cases that are pending *sub judice*.

Earlier this year, this Court adopted an amendment to *Federal Rule of Civil Procedure* 51 that now allows, pursuant to subsection (d)(2), a court to consider the issue of a plain error in jury instructions affecting substantial rights that has not been preserved as otherwise required under the rule. *Federal Rule of Civil Procedure* 51(d)(2).[1] Pursuant to this Court's Order of March 27, 2003, the operative effect of newly amended Rule 51 is December 1, 2003 and permits retrospective application to a case, "insofar as just and practicable" which affects substantial rights and is pending *sub judice*. (App. A, at 2a).

Prior to this Court's incorporation of the "plain error" doctrine in Rule 51, the Ninth Circuit stood alone among the circuits as the strictest enforcer of Rule 51 declaring that there is no "plain error" exception in civil cases. *Hammer v. Gross*, 932 F.2d 842, 847 (9th Cir. 1991) (*en banc*). Thus,

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[1] The Chief Justice's letter of March 27, 2003 to Vice President Cheney in his capacity as President of the United States Senate advising him of the amendments to the Federal Rules along with the Court's Order dated March 27, 2003 that the amended rules are effective December 1, 2003, and newly amended Rule 51 can be found at *http://www.uscourts.gov/rules/archive.htm*. For convenience of the Court copies of the same taken off the internet website are attached as Appendix "A".

Petitioners were foreclosed from arguing on appeal that even if the error affecting their substantial rights was generally waived under Rule 51, the Ninth Circuit could still consider the issue under the "plain error" doctrine. Petitioners recognize that retroactive application under Rule 51 is not absolute and was qualified by the Court's March 27, 2003 Order to cases insofar as it is "just and practicable." (App. A, 2a).

The term "just and practicable" suggests that retroactive application of Rule 51 depends on the exercise of equitable discretion by the federal courts analogous to the reasoning found in some of the Court's previous case law that has denied retrospective application of a newly announced judicial rule "to avoid injustice or hardship to civil litigants who have justifiably relied on prior law," *cf. American Trucking Assns., Inc. v. Smith*, 496 U.S. 167, 199, 110 S.Ct. 2323, 2342, 110 L.Ed.2d 148 (1990) (plurality opinion); *but see Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 97, 113 S.Ct. 2510, 2517, 125 L.Ed.2d 74 (1993) (holding that judicial decisionmaking "prohibit[s] the erection of selective temporal barriers to the application of federal law in noncriminal cases").

However, no justifiable reliance on prior law can be reasonably invoked in the case at bar since prior to the Ninth Circuit Opinion there was no direct case law in the circuit on the issue of whether it is error to charge the jury with the elements of the *McDonnell Douglas prima facie* case and the circuits are split on the issue. (Petition for Writ of Certiorari, App. B at 15a-18a) . Moreover, this Court has held even prior to *Harper* that denial of retroactive effect to a "new principle of law" in order to avoid "'injustice or hardship'" must not unduly undermine the purpose and effect of the new rule. *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107, 92 S.Ct.

349, 355-356, 30 L. Ed.2d 296 (1971) (quoting *Cipriano v. City of Houma*, 395 U.S. 701, 706, 89 S.Ct. 1897, 1900, 23 L. Ed.2d 647 (1969)).

It was the Ninth Circuit Opinion that established a new rule for the circuit that it is error to charge the jury with the elements of the *McDonnell Douglas prima facie* case (Petition for Writ of Certiorari, App. B at 15a-18a) and extensively discussed the circuit split to support its adoption of the newly announced rule, thus, no interests in fair and effective trial administration advanced by Rule 51 would be served if a court refused to reach the merits of the issue as applied to Petitioners. *Cf. City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 255-56, 101 S.Ct. 2748, 2754, 69 L. Ed.2d 616 (1981).

The Ninth Circuit held that it was error in this case to charge the jury with the elements of the *McDonell-Douglas* formulation since it has a significant potential to confuse juries and "'at [the jury] stage, the framework unnecessarily evades the ultimate question of discrimination vel non.'" (Petition for Writ of Certiorari, App. B, at 17a-18a) (quoting *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716, 103 S.Ct. 1478, 75 L. Ed.2d 403 (1983)).

The jury never reached the ultimate question it was required to reach as to whether Petitioners established a case for intentional discrimination by Respondent refusing to connect the facility to its sewer system. (Petition for Writ of Certiorari, App. B, at 20a). Rather, the jury made the credibility determinations as to whether Petitioners had established a prima facie case - a determination that this Court has instructed is beyond the function and expertise of the jury. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142, 120 S.Ct. 2097, 2106, 147 L. Ed.2d 105 (2000).

By the jury not reaching the ultimate question that it was required to reach, the district court committed plain error that requires reversal.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that this Petition for Rehearing be granted for decision by this Court or remand to the Ninth Circuit to consider under newly adopted *Federal Rule of Civil Procedure* 51(d)(2) whether the jury instructions charging the jury with the elements of the *McDonnell Douglas* burden-production framework constituted "plain error" requiring reversal of the judgment.

Dated: December 30, 2003

Respectfully submitted,

LAW OFFICES OF
FRANK A. WEISER

Frank A. Weiser
Counsel of Record

Attorney for Petitioners
SMITA SANGHVI and
TARUN SANGHVI

CERTIFICATE OF COUNSEL

I, Frank A. Weiser, certify as follows:

1. I am the attorney for Petitioners in this case. I prepared this Petition For Rehearing of Petition For Writ of Certiorari.

2. Pursuant to Rule 44.2 of the Supreme Court Rules, I certify that I have limited this Petition For Rehearing to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.

3. This Petition is presented in good faith and not for the purpose of delay.

DATED: December 30, 2003.

Respectfully submitted

LAW OFFICES OF
FRANK A. WEISER

Frank A. Weiser
Counsel of Record

Attorney for Petitioners
SMITA SANGHVI and
TARUN SANGHVI

APPENDIX A

March 27, 2003

Honorable Dick Cheney
President, United States Senate
Washington, D.C. 20510

Dear Mr. President:

I have the honor to submit to the Congress the amendments to the Federal Rules of Civil Procedure that have been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,

/s/ William H. Rehnquist

March 27, 2003

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. That the Federal Rules of Civil Procedure be, and they hereby are, amended by including therein amendments to Civil Rules 23, 51, 53, 54, and 71A.

[See infra., pp. __ __ __ .]

2. That Forms 19, 31, and 32 in the Appendix to the Federal Rules of Civil Procedure be, and they hereby are, amended by replacing all references to "19__" with references to "20__."

3. That the foregoing amendments to the Federal Rules of Civil Procedure shall take effect on December 1, 2003, and shall govern in all proceedings in civil cases thereafter commenced and, insofar as just and practicable, all proceedings then pending.

4. That the CHIEF JUSTICE be, and hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Civil Procedure in accordance with the provisions of Section 2072 of Title 28, United States Code.

Rule 51. Instructions to Jury; Objections; Preserving a Claim of Error

(a) Requests.

(1) A party may, at the close of the evidence or at an earlier reasonable time that the court directs, file and furnish to every other party written requests that the court instruct the jury on the law as set forth in the requests.

(2) After the close of the evidence, a party may:

(A) file requests for instructions on issues that could not reasonably have been anticipated at an earlier time for requests set under Rule 51(a)(1), and
(B) with the court's permission file untimely requests for instructions on any issue.

(b) Instructions. The court:

(1) must inform the parties of its proposed instructions and proposed action on the requests before instructing the jury and before final jury arguments;

(2) must give the parties an opportunity to object on the record and out of the jury's hearing to the proposed instructions and actions on requests before the instructions and arguments are delivered; and

(3) may instruct the jury at any time after trial begins and before the jury is discharged.

(c) Objections.

(1) A party who objects to an instruction or the failure to give an instruction must do so on the record, stating distinctly the matter objected to and the grounds of the objection.

(2) An objection is timely if:

(A) a party that has been informed of an instruction or action on a request before the jury is instructed and before final jury arguments, as provided by Rule 51(b)(1), objects at the opportunity for objection required by Rule 51(b)(2); or

(B) a party that has not been informed of an instruction or action on a request before the time for objection provided under Rule 51(b)(2) objects promptly after learning that the instruction or request will be, or has been, given or refused.

(d) Assigning Error; Plain Error.

(1) A party may assign as error:

(A) an error in an instruction actually given if that party made a proper objection under Rule 51(c), or

(B) a failure to give an instruction if that party made a proper request under Rule 51(a), and — unless the court made a definitive ruling on the record rejecting the request — also made a proper objection under Rule 51(c).

(2) A court may consider a plain error in the instructions affecting substantial rights that has not been preserved as required by Rule 51(d)(1)(A) or (B).